IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-828

FRANK A. GUNTHER, HERMAN EIG AND SIDNEY J. BROWN (Successors to Sheldon E. Bernstein, Leonard S. Melrod and Herman Eig), Partners d/b/a Savage Joint Venture, *Petitioners*

v.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

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Frank A. Gunther, Herman Eig and Sidney J. Brown, Partners d/b/a Savage Joint Venture, petition for a writ of certiorari to review the judgment of the Court of Special Appeals of Maryland entered in this proceeding on January 27, 1977 (based upon its opinion filed December 28, 1976).

OPINIONS BELOW

The opinion of the Court of Special Appeals (App. 1a-3a), the Memorandum Opinion and Order of the Circuit Court for Montgomery County which was adopted by the Court of Special Appeals (App. 5a-9a),

and the Order of the Court of Appeals of Maryland denying a petition for a writ of certiorari (App. 10a) are not reported.

JURISDICTION

The Order of the Maryland Court of Appeals denying the petition for a writ of certiorari to the Court of Special Appeals (App. 10a) was entered on July 13, 1977. On October 6, 1977, Mr. Chief Justice Burger extended the time for filing this petition to and including December 9, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Whether petitioners were denied due process of law by administrative frustration of their attempt to obtain approval of a property subdivision plan within the time limit specified in a savings clause accompanying a zoning change.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "* * * nor shall any State deprive any person of * * * property, without due process of law * * *."

STATEMENT

1. Introduction

Petitioners are the owners of a tract of land located in Montgomery County, Maryland, which they have desired to subdivide into residential lots. On August 20, 1974, petitioners' property was "down-zoned" to a "rural zone" with a five-acre minimum lot size, subject to a savings clause preserving the earlier zoning if "the application for a preliminary subdivision plan

had been submitted to the planning board * * * on or before June 4, 1974, and recorded before July 1, 1975." Montgomery County Code § 59-64B(d)(1). If the new zoning applied to petitioners' property, its value would be drastically reduced.[1]

Anticipating the rezoning, petitioners had filed their application for a preliminary subdivision plan consistent with the earlier zoning on or about May 31, 1974, within the period specified by the savings clause. In order to perfect their rights under the savings clause, it was necessary that the preliminary plan be approved by the Montgomery County Planning Board, a constituent entity of the respondent Commission,[2] in time to permit the filing and approval of a final record plat for the subdivision by the July 1, 1975 deadline for recording.

The procedures for the filing and processing of such preliminary plans and record plats are set forth in

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[1] The "down-zoning" increased the minimum lot size from one-half acre to five acres, reducing the potential number of lots in petitioners' 967.5 acre tract by ninety percent. Since it can reasonably be estimated that a five-acre lot in the area in question has a value approximately twice that of a half-acre lot, the effect of applying the new zoning would be to reduce the value of the property to one-fifth of its former value—a loss of many millions of dollars.

While the beneficial ownership of the property has been the same for many years—since 1962 as to the bulk of the parcel—there was a formal change of title under a deed without consideration dated October 1, 1975. The proceedings in the Maryland courts continued thereafter in the name of the former titleholders, one of whom is a present petitioner; we refer to the present and former titleholders interchangeably herein as "petitioners".

[2] See Annotated Code of Maryland Art. 66D § 7-111.

Montgomery County Code §§ 50-34 through 50-37, the most pertinent provisions of which are as follows:

"Sec. 50-35. [Preliminary subdivision plans]—Approval procedure.

"(a) *Referral of plan.* Two copies of the plan shall be referred forthwith to [specified] agencies when such agency has a direct interest in the installation or maintenance of utilities, roads or other public services which will serve the subdivision, for their review and recommendation with respect to approval of the plan. * * *

* * *

"(e) *Presentation of plan to board.* Every preliminary plan shall be presented to the board for its review and action at the earliest regular meeting after the staff has completed its study and is ready to make its recommendation to the board, together with a report of all other recommendations or communications received concerning such plan; provided, that the staff shall present the plan to the board not later than the first regular meeting which occurs after sixty days have elapsed from date of receipt of such plan, plus an extension of time granted for review by other agencies [up to a maximum of thirty days, see § 50-35(b)]. The board will act to:

(1) Approve.

(2) Approve, subject to conditions or modifications necessary to bring the plan and the proposed development into accord with this chapter and other regulations. * * *

(3) Disapprove, to be followed by written notice to the applicant stating the reasons therefor.

* * *

"Sec. 50-37. [Final Record Plats]—Procedure for approval and recording.

"(a) Filing of plat with application and plat fee.

* * *

"(2) The plat shall be deemed filed with the board when it is filed with the staff of the board; provided, that the staff shall have the authority to reject the plat within five days of its receipt if it finds that it does not conform to the approved preliminary plan, except for minor modifications, or with this chapter and the specifications and procedures adopted pursuant thereto, and further provided that his rejection is in writing and specifies the respects in which the plat is deficient.

"(3) The applicant may resubmit such a rejected plat at any time after ten days have elapsed from the date of the original submission, and any plat so resubmitted shall be considered by the board without further rejection by the staff; provided, that the board may waive the ten-day period before resubmission of a plat whenever, in its opinion, such waiver is justified or if the plat in question has been revised to eliminate the cause of its rejection.

(b) *Plat to comply with approved preliminary plan.* No final (record) plat of a subdivision shall be approved unless it complies with the preliminary plan as approved by the board; except, that the board may allow for minor modifications in the plan which, in its opinion, do not alter the intent of its previous approval.

(c) *Board to act within thirty days.* The board shall approve or disapprove a final (record) plat within thirty days after submission thereof or after resubmission; otherwise, such plat shall be deemed approved and on demand a certificate to that effect and the original record plat signed in form for recording shall be issued by the board; provided, that the applicant may waive this requirement and consent to an extension of such period. If the plat is disapproved, the reasons

> therefor shall be stated in the minutes of the board and shall be promptly submitted in writing to the applicant."

These procedural requirements evidence a concern that approval or disapproval of subdivision plans and record plats proceed expeditiously without administrative delay; the maximum time permitted for processing of preliminary plans is ninety days and the maximum time for Board approval of final record plats is thirty days. The savings clause with respect to the rural rezoning no doubt reflected an expectation that the thirteen-month period allowed between the initial plan filing and final plat recording would be ample not only for consideration of applications under the clause but also for correction and reconsideration of any deficiencies that might be found.

This expectation was not to be fulfilled in the case of petitioners' application, which foundered upon Commission delay. The result was the present litigation, which commenced with the filing of a "petition for writ of mandamus, injunction as ancillary relief declaratory judgment" in the Circuit Court for Montgomery County on June 27, 1975, four days before the final deadline for recording specified in the savings clause. Since summary judgment was entered for respondent without any factual submission by respondent (under procedures essentially the same as those of the Federal Rules of Civil Procedure), the uncontested facts are as set forth in the petition in the trial court.[3]

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[3] Like F.R.Civ.P. 56(c), Maryland Rule of Procedure 610(d) permits summary judgment only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law."

2. The Commission's Handling of the Preliminary Subdivision Plan and Final Record Plat Submitted by Petitioners.

The verified petition filed in the trial court (App. 11a-17a) alleged as follows, without contradiction in the record:

The preliminary subdivision plan, together with petitioners' further submissions and resubmissions, "in all respects complied with the laws of Montgomery County, Maryland, regulating the subdivision of land" (¶ 2); in particular, an engineering report submitted in June 1974 "met all of the requirements of [the] ordinance" requiring provision of adequate public facilities including sewerage and water (¶ 4).

Notwithstanding the statutory requirement that such preliminary plans be submitted to the Planning Board at its first meeting sixty days after filing,[4] petitioners' preliminary plan was not submitted to the Board until May 1, 1975, eleven months after filing and after many intervening Board meetings (¶¶ 7, 9). The Commission's staff failed even to take the initial step of seeking the comments of other interested agencies—required to be commenced "forthwith" (see p. 4, *supra*)—until after March 5, 1975 (¶ 14). These delays occurred notwithstanding "several unsuccessful requests by the [petitioners] to have the [Commission's] staff proceed with review procedures" (¶ 10). Petitioners were notified of the Planning Board's action on the preliminary plan by letter dated May 7, 1975, which stated that the plan was disapproved for the following reasons:

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[4] There was no extension of time for comments by other agencies under the provision permitting one thirty-day extension for that purpose. (¶ 7).

"1. Lots do not meet the area requirements of the Rural Zone.

"2. Proposed subdivision lies within Category III of the 10-Year Water and Sewerage Plan.

"3. Applicant has failed to provide necessary information in accordance with Section 50-35 of the Subdivision Regulations to determine adequacy and feasibility of an interim community sewerage system." (Petition Exhibit "I").

As noted, the petition alleged, without contradiction, that there were no such deficiencies in the preliminary plan justifying its rejection on the merits.[5]

Concerned over the Commission's inaction on the preliminary plan and the rapid approach of the July 1, 1975 deadline for approval and recordation of a final record plat, petitioners on or about February 10, 1975 had submitted a proposed final record plat for a portion of the property covered by the preliminary plan (¶ 10). The Commission's staff immediately rejected it on the ground that the preliminary plan had not yet been approved (¶ 11). Petitioners then resubmitted the record plat by letter of February 24, pursuant to the statutory provision requiring the Planning Board to consider such a resubmitted plan (¶ 13; see p. 5, *supra*). Notwithstanding the statutory requirement that the Board act on the record plat within thirty days (*ibid.*), the Board did not do so until its May 1

[5] Points 2 and 3, relating to water and sewerage, were controverted by ¶¶ 4, 20 and 21 of the petition. Point 1 was not applicable because of the savings clause of the ordinance down-zoning the property to a rural zone (¶ 19). As we note *infra*, the courts below did not reject petitioners' contention that the preliminary plan did comply with all applicable requirements; they did not even consider that contention.

meeting, following which it notified petitioners by letter dated May 6 that the record plat had been disapproved (¶ 17). The reasons given in the May 6 letter were as follows:

"1. Proposed record plat is not in accordance with an approved preliminary plan.

"2. Proposed lots do not meet the zoning requirements of the Rural Zone.

"3. Proposed subdivision plan is not in accordance with Section 50-27 of the Subdivision Regulations." (Petition Exhibit "H").

The latter two reasons were essentially the same as those for rejection of the preliminary plan at the same meeting which were stated in the Commission's May 7 letter; these reasons were similarly disputed by the petition in the trial court.

3. The Contentions and Proceedings Below

The petition filed in the trial court just before the expiration of the savings period (App. 11a-17a) alleged the foregoing facts and contended that "approval of the said preliminary plan was frustrated by the inaction of [the Commission's] staff * * * in an effort to prevent petitioners from perfecting their status under the grandfather provision of the Rural Zone" (¶ 12); it further contended that the Commission's "dilatory tactics * * * have frustrated the Petitioners' ability to record plats of their proposed subdivision in accordance with their preliminary plan prior to [the expiration of the savings period]" (¶ 22). The petition claimed that, under the applicable State law, the staff's failure to present the preliminary plan to the Planning Board within the period specified in Code § 50-35(e)

required that the plan be deemed approved by default and further that the record plat must also be deemed approved by default (and thus eligible for recording) under Code § 50-37(c). In addition, the petition claimed that the Commission's actions were "calculated to deprive petitioners of property rights without due process of law" (¶ 22). It sought equitable relief determining petitioners' right to *nunc pro tunc* recordation of final record plats conforming with the preliminary plan submitted in 1974 or, at the least, prohibiting the Commission from rejecting the plan on the basis of the rural rezoning.

The Commission responded with a demurrer unaccompanied by any affidavit or other factual submission and did not deny any of the factual allegations of the petition. The demurrer merely contended that the petition "fails to allege facts which state a cause of action against Defendant" (¶ 1) and that "the remedy [sought] is nugatory in that Plaintiffs' preliminary plan was disapproved by the Montgomery County Planning Board" (¶ 2).

The trial court held that petitioners had standing to sue, that there was a justiciable controversy and that the petition was not technically subject to demurrer. It went on, however, to treat the Commission's pleading as a motion for summary judgment, following procedures essentially the same as those of F.R.Civ.P. 56 (App. 5a).[6] The trial court made a threshold decision that unless State law would require that the preliminary plan be deemed automatically approved,

[6] See p. 6, n.3, *supra*. The use of summary judgment rather than demurrer was based upon the principles set forth in *Urbana Civic Assn.* v. *Frederick County Board of Commissioners*, 23 Md. App. 49, 325 A.2d 755 (1974).

"plaintiffs have no case, whatever the reasons for the planning staff's inordinate delay" (App. 6a). It then rejected petitioners' interpretation of the State law provisions claimed to require automatic approval and therefore granted summary judgment in favor of the Commission. The trial court did not consider the propriety of the Planning Board's ultimate disapproval of the record plat and preliminary plan—of which petitioners were given notice on May 6 and 7, 1975, respectively—noting only that "petitioners' requested relief * * * would by-pass any consideration of the two additional reasons [other than non-approval of the preliminary plan] for disapproval stated by the Planning Board when it rejected the petitioners' proposed record plat for the second time" (App. 8a).[7] The trial court's opinion also did not address the claim that the Commission's handling of petitioners' filings denied them due process. As noted, however, the court expressed the view that the staff's "inordinate delay" would give petitioners no right to any relief.

On appeal, the Court of Special Appeals affirmed by adoption of the opinion of the trial court with brief additional remarks (App. 1a-3a). These remarks added another point in support of the trial court's interpretation of the State law provisions claimed to require automatic approval, and added the following discussion of the remaining issues:

> "We have also carefully considered the appellants' allegations of bad faith and purposefulness on the part of the appellee and the appellants' contention

[7] Petitioners argued in the courts below that the additional reasons stated in the Commission's letters—relating to the provision of sewer facilities—were insufficient as a matter of law to justify disapproval.

that equitable estoppel applies in this case. We find no legal or factual basis for these contentions." (App. 3a).

The Court of Appeals of Maryland denied a petition for a writ of certiorari, stating that "there has been no showing that review by certiorari is desirable and in the public interest" (App. 10a).

REASONS FOR GRANTING THE WRIT

While the specific question presented here has not previously been determined by this Court, the decision below conflicts with the due process precedents in this Court by permitting purposeful administrative delay to frustrate exercise of the property rights afforded by the rezoning savings clause. This question of a property owner's procedural rights at the hands of the local officials who control real estate development has broad significance in the present era of conflict between the public need for new housing at reasonable cost and the resistance in some quarters to the land use necessary to satisfy that need.

The due process inquiry begins with the landmark zoning decision, *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365. *Euclid* recognized that zoning restrictions infringe upon property rights in the Fourteenth Amendment sense; while such application of the police power is generally a permissible infringement, the Court admonished that particular zoning restrictions would violate due process if "clearly arbitrary and unreasonable" (272 U.S. at 395). This Court has recently reiterated this substantive due process standard in *City of Eastlake* v. *Forest City Enterprises,*

Inc., 426 U.S. 668, 676. See also, *e.g., Washington ex rel. Seattle Trust Co.* v. *Roberge,* 278 U.S. 116.

Eastlake went on to deal with the procedural due process requirements applicable to changes in zoning. While the majority found no constitutional infirmity in a charter provision requiring a 55 percent referendum vote to rezone in the owner's favor, Mr. Justice Stevens' dissent accurately observed that it was common ground that the procedures for rezoning must be judged by standards of procedural due process; "[b]oth reason and authority support that assumption" (426 U.S. at 681). Indeed, the majority opinion suggested that a stricter procedural standard might apply to "a zoning action denigrating the use or depreciating the value of land"—the kind of rezoning involved in the present case, where "existing rights are being impaired" (426 U.S. at 679 n.13). In any event, there was no disagreement with Mr. Justice Stevens' statement that "The insistence on fair procedure in this area of the law falls squarely within the purpose of the Due Process Clause of the Fourteenth Amendment" (426 U.S. at 685-686). The only disagreement was as to what "fair procedure" required in that case.

The issue in the present case is what "fair procedure" requires when real property is "down-zoned" to the owner's detriment—specifically whether the owner can be deprived of the previously permitted use solely by reason of administrative obstructionism designed to frustrate "grandfather" rights that would otherwise have prevailed. The courts below held that such purposeful destruction of the owner's statutory zoning rights is of no significance either under State

law or under the Fourteenth Amendment due process clause. Petitioners submit that the due process principles enunciated by this Court do not countenance such a lawless deprivation of property rights.[8]

On this record it must be taken as established that petitioners' failure to obtain Planning Board approval of their plan of subdivision under the pre-existing zoning was caused by administrative delay deliberately calculated "to prevent petitioners from perfecting their status under the grandfather provision of the Rural Zone." The trial court petition so alleged (p. 9, *supra*) and was uncontradicted by the Commission's demurrer. Moreover, the trial court held (in an opinion adopted on appeal) that absent automatic approval by default under State law, "plaintiffs have no case, whatever the reasons for the planning staff's inordinate delay" (p. 11, *supra*); it was presumably in reliance upon this view that the courts below failed even to consider the facts relating to administrative obstruction. The Planning Board's eventual disapproval of the plan (of which petitioners were notified on May 7, 1975) did not purge the prejudice resulting from the delay. For such belated notification left petitioners insufficient opportunity to meet the Commission's objections—either by submitting further arguments or by revising their plan—in time to obtain

[8] It is, of course, well established that statutory entitlements under State law—such as the entitlement to subdivide under the pre-existing zoning of petitioners' property pursuant to the savings clause accompanying the rezoning—cannot be taken away without due process. *E.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254, 261-262; see *Perry* v. *Sinderman*, 408 U.S. 593, 601-602; *Fuentes* v. *Shevin*, 407 U.S. 67, 86-87. Thus, it is not necessary to reach the question whether the savings clause itself was constitutionally necessary.

approval of both the plan and a final record plat before the July 1 final deadline.[9]

Unreasonable administrative delay which frustrates protection of property rights, such as petitioners' here, plainly denies due process in contravention of the Fourteenth Amendment. "Property may be as effectively taken by long-continued and unreasonable delay * * * as by [unlawful adverse action]." *Smith* v. *Illinois Bell Telephone Co.*, 270 U.S. 587, 591. In *Illinois Bell* this Court found a due process violation in a State rate commission's protracted delay in acting upon a proposed rate increase needed to eliminate a utility's operating deficit. The Court therefore affirmed an injunction permitting the utility to collect the proposed higher rates pending future rate-making by the commission.

Here also, the Commission's unreasonable delay deprived petitioners of meaningful administrative action upon their application, with the result that petitioners have been deprived of the property rights afforded by the savings clause that accompanied the zoning change; indeed, it must be taken as established that such was the Commission's purpose. The remedy for this denial of administrative due process should

[9] Such a course would not have been feasible in view of the Planning Board's meeting schedule and the time required for preparation and staff processing of the necessary papers. For example, as noted at pp. 5-6, *supra*, thirty days must be allowed for approval of a final record plat. Only 54 days remained after the May 7 letter was mailed; but for the delay there would have been some ten months after the Board's action for any necessary further steps.

As previously noted, the courts below did not consider petitioners' contention that there was no substantive basis for the Commission's belated actions purporting to disapprove the plan.

have been similar to that in *Illinois Bell*. As the trial court petition requested, the Commission should have been prohibited from asserting the rezoning of petitioners' property as a bar to its subdivision under the prior zoning, a right which petitioners would have had under State law but for the improper interference with the processing of their timely application under the savings clause.[10]

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1977

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[10] It would, of course, remain open for the trial court to consider on remand the factual question whether the allegations of purposeful obstruction are true—a question that it improperly avoided in the first instance. In addition, given the conclusive adverse ruling on the State law issue, it would remain necessary for petitioners to obtain substantive approval for their preliminary plan consistent with the prior zoning, either upon review of the Planning Board's disapproval or in further proceedings before the Board. Petitioners seek only an opportunity for fair consideration of their plan in the manner contemplated by the savings clause.

APPENDIX

APPENDIX

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND
No. 466, September Term, 1976

SHELDON E. BERNSTEIN, et al., *Appellants*

v.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, *Appellee*

Morton, Moylan, Liss, JJ.

Per Curiam

Filed: December 28, 1976

We have carefully considered the voluminous record in this case and have concluded we cannot improve upon the well reasoned memorandum opinion filed in this case by the trial Judge Joseph M. Mathias of the Circuit Court for Montgomery County.

We adopt his opinion which is attached hereto. We note in further support of Judge Mathias' and our own conclusion the language of Article 66D, Section 7-117, of the Annotated Code of Maryland, which reads as follows:

> "The Commission shall approve or disapprove a subdivision plat within 30 days after its submission.

Otherwise the plat shall be deemed to have been approved, and a certificate to that effect shall be issued by the Commission upon demand. In Prince George's County, each office to which a preliminary subdivision is referred shall return one copy of the plan to the planning board within 30 days with comments noted on it. If the reply is not made within 30 days by any office to whom referred, the plan shall be deemed to be approved by it. In Prince George's County, the Commission shall approve or disapprove a preliminary subdivision plan within 70 days after its submission. *Otherwise, the preliminary subdivision plan shall be deemed to have been approved, and a certificate to that effect shall be issued by the Commission upon demand.* The applicant for the Commission's approval may waive either or both of these requirements and consent to the extension of the periods. However, in Prince George's County no such waiver may be for a period greater than the original period allowed for approval of the plan or preliminary plan. The ground of disapproval of any plat shall be stated upon the records of the Commission. Any plat submitted to the Commission shall contain the name and address of a person to whom notice of hearing may be sent. No plat may be sent by mail to the address not less than five days before the date fixed therefor. In his application, however, the applicant may waive the hearing and notice, and the approval of any plat exactly as submitted by the applicant is a waiver of the hearing and notice. The subdivision regulations may include provisions for notice to owners of properties that would be substantially affected by approval of any subdivision plat and for public hearings on the applications and may include provisions for an appeal to the district council from a decision approving or disapproving a subdivision plat. (1975, ch. 892.)" (Emphasis supplied).

It is evident from a comparison of the language of Section 50-35 of Montgomery County's Subdivision Ordinance and the section above quoted that there is a substantial difference in the philosophies adopted by the two counties. Prince George's County has opted for mandatory requirements upon its Commission; Montgomery County has set permissive standards. We agree that given the language of Montgomery County's ordinance *Maryland National Capital Park and Planning Commission* v. *Silkor Development Company, supra,* is controlling.

We have also carefully considered the appellants' allegations of bad faith and purposefulness on the part of the appellee and the appellants' contention that equitable estoppel applies in this case. We find no legal or factual basis for these contentions.

ORDER DENYING DECLARATORY JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANTS.

MANDATE

COURT OF SPECIAL APPEALS OF MARYLAND

No. 466, September Term, 1976

SHELDON E. BERNSTEIN et al

vs.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

Appeal from the Circuit Court for Montgomery County.
Filed: June 29, 1976.

December 28, 1976—Per Curiam filed. Order denying Declaratory Judgment affirmed. Costs to be paid by appellants.

January 27, 1977—Mandate issued.

STATEMENT OF COSTS:

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STATE OF MARYLAND, *Sct:*

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this twenty-seventh day of January A.D. 1977.

/s/ JULIUS A. ROMANO
Julius A. Romano
Clerk of the Court of
Special Appeals of Maryland.

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE.

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

Law No. 42637

SHELDON E. BERNSTEIN, et al, *Plaintiffs*

v.

MARYLAND NATIONAL CAPITAL PARK AND PLANNING COMMISSION, *Defendant*

Memorandum Opinion and Order

This is essentially a Bill for Declaratory Judgment, to which the defendant has demurred. We find that the plaintiffs have standing to sue and that there is a justiciable controversy present, i.e. whether or not the Planning Board wrongfully refused to approve plaintiffs' final record plat. Therefore, plaintiffs are entitled to a judgment of this Court declaring their rights. In Declaratory Judgment, the only purpose of a demurrer is to test the plaintiffs' right to a declaration.

> "Where the plaintiff's pleading sets forth an actual or justiciable controversy it is not subject to demurrer since it sets forth a cause of action even though the plaintiff may not be entitled to a favorable declaration on the facts stated in his complaint. . . ." *22 Am. Jur. 2d Declaratory Judgment, Sec. 91 (1965).*

We hold in this case plaintiffs' Bill of Complaint is not subject to demurrer. However, since there is no dispute as to any material facts, and the issue before us is one of law, we shall proceed to dispose of it by way of Summary Declaratory Judgment. *Urbana Civic Association* v. *Frederick County, 23 Md. App. 49, at 54-55.*

In a nutshell plaintiffs contend that their preliminary plan of subdivision submitted to the Planning Commission's staff on May 31, 1974, was automatically approved

by operation of law because the staff did not present it to the Planning Board by the first regular meeting which occurred after sixty days from receipt of the plan, pursuant to *Sec. 50-35 of the County's Subdivision Ordinance;* consequently, the Commission was wrong in subsequently disapproving plaintiffs' final plat of subdivision for lack of an approved preliminary plan.

Submission of a preliminary plan to the Park and Planning Commission is a necessary step before a final plat of subdivision will be approved. *Sec. 50-35* relating to preliminary plans reads as follows:

> "(e) Presentation of Plan to Board. Every preliminary plan shall be presented to the Board for its review and action at the earliest regular meeting after the staff has completed its study and is ready to make its recommendations to the Board, together with a report of all other recommendations or communications received concerning such plan; provided that the staff shall present the plan to the Board not later than the first regular meeting which occurs after sixty days have elapsed from date of receipt of such plan plus an extension of time granted for review by other agencies. . . ."

The determinative issue in this case, therefore, is whether this section necessarily implies that a preliminary plan will automatically be approved if the time constraint is not met. If not, plaintiffs have no case, whatever the reasons for the planning staff's inordinate delay.

We find the case of *Maryland National Capital Park and Planning Commission* v. *Silkor Development Company, reported in 246 Md. 516,* to be controlling. The holding of the Court of Appeals in that case was that Chapter 815 of the Acts of the 1963 General Assembly was permissive and not mandatory. Chapter 185, which was an enabling Act read, in pertinent part:

> "The regulations or practice of the Commission may provide . . . for a tentative or a conditional approval or disapproval of preliminary plats within sixty (60) days after submission thereof; otherwise the preliminary plat shall be deemed to have been approved and a certificate to that effect shall be issued by the Commission upon demand. . . ."

When Chapter 815 was passed the Montgomery County Subdivision Ordinance, now codified as Section 50-35, was already in effect and was known as Section 104-24(e). The language was the same then as it is now.

In *Silkor,* the trial judge issued mandamus against the Planning Commission because in that case, as in ours, the staff had failed to make its presentation of the preliminary plan to the Board within sixty days. The same argument was advanced in *Silkor* as in our case, namely, that the staff's failure to present the plan to the Board within the time specified resulted in the plans being automatically approved. The Court of Appeals, however, reversed, holding that Chapter 815 was permissive only in that it authorized the Montgomery County Council, if it saw fit to do so, to provide that if preliminary plans were not submitted within sixty days, they would be deemed to have been approved.

The language of Section 50-35 is the same as it was before the passage of Chapter 815. The County Council has never seen fit to amend it to make it clearly a default statute by incorporating the words "otherwise, the preliminary plan shall be deemed to have been affirmed and a certificate to that effect shall be issued by the Commission upon demand".

The section of the subdivision ordinance relating to the approval of final plats of subdivision is now 50-37. That also was a part of the Montgomery County ordinance at the time of the passage of Chapter 815. It was codified then as

Section 104-26(c) and its language was the same then as now. It reads in pertinent part:

> "(c) Board to Act Within Thirty Days. The Board shall approve or disapprove a final (record) plat within thirty (30) days after submission thereof or after resubmission; *otherwise such plat shall be deemed approved and on demand a certificate to that effect and the original record plat signed in form for recording shall be issued by the Board. . . .*" (Emphasis added).

We think it clear that the Montgomery County Council intended what is now known as Section 50-37 to be a default statute, and that it did not intend Section 50-35, with which we are here concerned, to be a default statute.

After the petitioners' first submission of a final plat was disapproved, they made a second submission. While the only reason given by the Board for disapproving the first submission was that it did not comply with any approved preliminary plan, there were three reasons given when the Board disapproved the second submission. The first was that it was not in accordance with an approved preliminary plan; the second, that the proposed lots did not meet the zoning requirements because by that time the entire area had been down-zoned; and the third was that the proposed subdivision plan was not in accordance with Section 50-27 of the subdivision regulations pertaining to water and sewer facilities. The petitioners' prayer for a declaratory judgment asks that the petitioners be deemed to have the right to final (record) plats of subdivision which comply with their preliminary plan of subdivision as though it had been approved on or before June 30, 1974, which was before the down-zoning. The petitioners' requested relief, therefore, would by-pass any consideration of the two additional reasons for disapproval stated by the Planning Board when it rejected the petitioners' proposed record plat for the second time.

Because we are of the view that Section 50-35 of the County's Subdivision regulations does not mandate an automatic approval of preliminary plans which are not presented to the Board within the time specified, we think the petitioners' case fails, and that the defendant is entitled to a summary declaratory judgment.

Accordingly, it is, this 30th day of March, 1976, by the Circuit Court for Montgomery County, Maryland, by way of declaratory judgment, hereby ADJUDGED, ORDERED AND DECREED:

1. That the petitioners have no existing right to a final (record) plat of subdivision of all or any part of the land mentioned in their petition because they have not obtained the Planning Board's approval of any preliminary plan of subdivision of said land, as required by Section 50-37 of the Montgomery County Subdivision Regulations.

2. That, consequently, petitioners have no existing right to a writ of mandamus or to an order of injunction as prayed.

/s/ JOSEPH M. MATHIAS
Joseph M. Mathias
Judge

IN THE COURT OF APPEALS OF MARYLAND

SHELDON E. BERNSTEIN et al.

v.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

Petition Docket No. 463

September Term, 1976

(No. 466, September Term, 1976 Court of Special Appeals)

Order

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the said petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

Judge Levine did not participate in the consideration of this petition.

/s/ ROBERT C. MURPHY
Robert C. Murphy
Chief Judge

Date: July 13, 1977.

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

Law No. 42637

SHELDON E. BERNSTEIN, LEONARD S. MELROD and HERMAN EIG, c/o Beltway Plaza Developers, 7910 Cherrywood Lane, Greenbelt, Maryland 20770 Partners Trading as SAVAGE JOINT VENTURE, *Petitioners*

vs.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, 8787 Georgia Avenue, Silver Spring, Maryland, *Defendant*

Petition for Writ of Mandamus, Injunction as Ancillary Relief, and Declaratory Judgment

(Filed June 27, 1975)

The Petitioners, Sheldon E. Bernstein, Leonard S. Melrod and Herman Eig, Partners trading as Savage Joint Venture, by their attorney, William M. Canby, sue the Defendant, Maryland-National Capital Park and Planning Commission, and for cause of action say:

1. That, on or about May 31, 1974, the Petitioners duly and properly submitted to the Defendant for its approval a preliminary plan of subdivision of a tract of land of which the Petitioners are the fee simple owners containing approximately 967.5 acres of land and situated near the village of Darnestown in Montgomery County, Maryland, known as the Savage Tract.

2. That said submission and all other submissions and resubmissions to Defendant hereinafter mentioned in all respects complied with the laws of Montgomery County, Maryland, regulating the subdivision of land, Chapter 50, Montgomery County Code, 1972, hereinafter referred to as "Subdivision Regulations."

3. That on June 17, 1974, said preliminary plan was conferenced by the Subdivision Review Committee chaired by the Chief of Development Review Division of the Defendant's staff and having as members representatives of the various subdivision reviewing agencies.

4. That in July 1974, pursuant to memorandum directives of the said Chief of Development Review Division, dated July 5, 1973 and October 4, 1973, Petitioners submitted to the Defendant an engineering report on said proposed subdivision in compliance with Montgomery County Maryland Ordinance 7-41, Adequate Public Utilities Ordinance; that said report met all of the requirements of said ordinance.

5. That Petitioners propose to provide water for said subdivision by way of individual wells on each lot.

6. That Petitioners propose to provide sewer service for said subdivision by way of a private central system, sometimes referred to as a community system; that in May of 1972 the County Executive's Site Selection Task Force selected Petitioners' property as an alternative site for the construction of an advanced wastewater treatment plant, designating it site "S-4."

7. That notwithstanding the provisions of Section 50-35 of said Subdivision Regulations, the Defendant's staff did not present Plaintiffs' preliminary plan of subdivision to the Montgomery County Planning Board at the first regular meeting occuring sixty days after the date of Defendant's receipt of the plan nor has there been a time extension granted reviewing agencies for the review of Plaintiffs' plan.

8. That notwithstanding their having filed their engineering report and efforts on the part of Petitioners through their engineer to have their preliminary plan processed, Petitioners, on December 13, 1974, received the attached letter dated December 12, 1974, which is incorporated

herein by reference as Exhibit "A"; that said letter was in response to a letter from Petitioners' engineers dated December 2, 1974, a copy of which is attached hereto and incorporated herein by reference as Exhibit "B"; that Exhibit "A" was not sent to the Petitioners until approximately six and one-half months after the filing of the preliminary plan for approval as aforesaid.

9. That notwithstanding the language of Exhibit "A" that "I will be more than happy • • • to present the plan as submitted to the Planning Board at the next meeting", the said preliminary plan was not submitted to the Planning Board until May 1, 1975, approximately eleven and one-half months after it was filed for approval and after many intervening Planning Board meetings.

10. That upon failure on the part of the said Planning Board to review Plaintiffs' plan as aforesaid within the time limits allowed by law as stated in Exhibit "B", and several unsuccessful requests by the Plaintiffs to have the Defendant's staff proceed with review procedures as established by the said Subdivision Regulations, Plaintiffs, on or about February 10, 1975, duly submitted to the Defendant for its approval a final record plat of a 39.4544 acre portion of said property which was in compliance with said preliminary plan and is attached hereto and incorporated herein by reference as Exhibit "C".

11. That Defendant's staff rejected said final record plat by letter dated February 11, 1975, a copy of which is attached hereto and incorporated herein by reference as Exhibit "D"; that the sole and erroneous reason given for rejection was that the record plat did not comply with an approved preliminary plan.

12. That approval of the said preliminary plan was frustrated by the inaction of the Defendant's staff; that Petitioners believe and, so believing, aver that Defendant's staff refused to refer Petitioners' plan for agency study in

an effort to prevent Petitioners from perfecting their status under the grandfather provision of the Rural Zone and to prevent development of the land when a large portion of the land was to be acquired for public use as a park site.

13. That by letter of February 24, 1975, a copy of which is attached hereto and incorporated herein by reference as Exhibit "E", Petitioners resubmitted their record plat to Defendant for approval pursuant to the suggestion contained in Exhibit "D". That said rejection was of no force and effect, therefore the rejection was a nullity, and the record plat is approved as a matter of law as provided in Section 50-37 of the Subdivision Regulations.

14. That Petitioners are informed by their engineer, Kenneth E. den Outer, that on March 5, 1975, the said Mr. den Outer was advised by Defendant's Chief of Development Review Division that Defendant's staff would for the first time initiate agency review of said preliminary plan notwithstanding said plan having been resubmitted for approval in May 1974, some nine and one-half months prior thereto.

15. That by letter dated April 2, 1975, a copy of which is attached hereto and incorporated herein by reference as Exhibit "F", Defendant's staff took the position that Exhibit "E" did not constitute a formal resubmission of the said final record plat and was therefore insufficient; that Petitioners believe and, so believing, aver that Defendant's staff sought to have a further resubmission not for the reason stated in Exhibit "F", but in an effort to gain additional time to obtain agency review of the preliminary plan prior to review by the Montgomery County Planning Board notwithstanding that more than thirty days had elapsed following resubmission and the record plat had become approved as a matter of law.

16. That by letter dated April 11, 1975, a copy of which is attached hereto and incorporated herein by reference as Exhibit "G", Petitioners, seeking to comply in all respects with the law and the suggestion of Defendant's staff, made a further resubmission of the final record plat to Defendant.

17. That by letter dated May 6, 1975, a copy of which is attached hereto and incorporated by reference herein as Exhibit "H", Defendant purported to disapprove the said record plat.

18. That notwithstanding said sixty day period having expired as aforesaid, by letter dated May 7, 1975, a copy of which is attached hereto and incorporated herein by reference as Exhibit "I", Defendant purported to disapprove said preliminary plan of subdivision.

19. That subdivision of Petitioners' land is exempt from the provisions of the Rural Zone under the "grandfather" provisions of Section 59-64b of the Montgomery County Zoning Ordinance.

20. That Section 50-35 of the said Subdivision Regulations places the burden on the Defendant to "forthwith" obtain agency approval of preliminary plans submitted to Defendant for approval; that the determination of the adequacy and feasibility of a private community sewerage system is not a part of the Section 50-35 review procedure, but is a function of the State of Maryland Department of Health and Mental Hygiene, actuated by the developer, both under the said Subdivision Regulations, Section 50-27 (b)(2), and, the Annotated Code of Maryland, Article 43, Section 396.

21. That Petitioners believe and therefore aver that the Subdivision Regulations contemplate and so provide that approval by the Defendant of subdivision plans which propose private community sewerage systems, both preliminary plans and final record plats, shall be made subject

to approval by the State Department of Health and Mental Hygiene and the Washington Suburban Sanitary Commission, if applicable.

22. That the aforesaid unlawful dilatory tactics of the Defendant have frustrated the Petitioners' ability to record plats of their proposed subdivision in accordance with their preliminary plan prior to July 1, 1975, the date when their exemption under the said "grandfather" provision of the Rural Zone expires; that said actions are calculated to deprive Petitioners of property rights without due process of law.

23. That unless relief is afforded Petitioners by way of injunction, they will suffer irreparable injury.

WHEREFORE, Petitioners pray as follows:

1. That the Court issue a writ of mandamus requiring and compelling the Defendant to comply with its statutory duty and process and approve final record plats of subdivision which comply with Petitioners' preliminary plan of subdivision.

2. That Petitioners be given ancillary relief by way of injunction prohibiting the Defendant from applying the provisions of the said Rural Zone as a bar to recordation of final record plats of subdivision which comply with Petitioners' preliminary plan of subdivision.

3. For a declaratory judgment declaring the right of the Petitioners to record final record plats of subdivision which comply with their preliminary plan of subdivision on or after July 1, 1975, *nunc pro tunc* as of June 30, 1974 or some date prior thereto.

4. For such other and further relief as to the Court shall seem just and proper.

William M. Canby
Attorney for Petitioners
200 Monroe Street
Rockville, Maryland 20850

VERIFICATION

I do solemnly declare and affirm under penalties of perjury that the contents of the foregoing document are true and correct.

Herman Eig
Partner
Savage Tract Joint Venture
c/o Beltway Plaza Developers
7910 Cherrywood Lane
Greenbelt, Maryland 20770

[EXHIBITS OMITTED IN PRINTING]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-828

FRANK A. GUNTHER, HERMAN EIG AND SIDNEY J. BROWN (SUCCESSORS TO SHELDON E. BERNSTEIN, LEONARD S. MELROD AND HERMAN EIG), PARTNERS D/B/A SAVAGE JOINT VENTURE, *Petitioners*

V.

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF FOR PARK AND PLANNING COMMISSION IN OPPOSITION

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January 1978

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-828

FRANK A. GUNTHER, HERMAN EIG AND SIDNEY J. BROWN (SUCCESSORS TO SHELDON E. BERNSTEIN, LEONARD S. MELROD AND HERMAN EIG), PARTNERS D/B/A SAVAGE JOINT VENTURE, *Petitioners*

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THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF FOR PARK AND PLANNING COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland (Pet. App. 1a-3a), affirming on respondent's behalf the unreported opinion of the Circuit Court for Montgomery County, Maryland (Pet. App. 5a-9a), and the Order of the Court of Appeals of Maryland denying a petition for a writ of certiorari "as there has been no showing that review by certiorari is desirable and in the public interest" (Pet. App. 10a) are not reported.

JURISDICTION

The Order of the Court of Appeals of Maryland denying the petition for a writ of certiorari to the Court of Special Appeals was entered on July 13, 1977. On January 10, 1978, the Clerk of the Supreme Court extended the time for filing this brief in opposition to January 25, 1978. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "* * * nor shall any State deprive any person of * * * property, without due process of law * * *."

QUESTION PRESENTED

Whether petitioners were denied due process of law by respondent's disapproval of a final record plat of a non-approved preliminary subdivision plan.

STATEMENT

A review of the Maryland court opinions in this case (Pet. App. 1a-3a, 5a-9a) show that (1) this is a subdivision, not a zoning, case, and (2) this is a simple case of statutory construction: can a *preliminary* subdivision plan, in Montgomery County, be approved automatically by default if respondent's Montgomery County Planning Board does not act within 60 days of submission. The Maryland courts answered "no," given the language of Article 66D of the Annotated Code of Maryland (sections 7-116(b), 7-117), the County Subdivision Ordinance (especially sections 50-2, 50-34, 50-35, 50-37(b) and (c), Montgomery County Code, 1972, as amended), and *Maryland-National Capital Park and Planning Commission v. Silkor Development Corporation*, 246 Md. 516, 229 A.2d 135 (1967).

Petitioners' trial court petition (Pet. App. 11a-17a) was contradicted clearly by a demurrer, a preliminary response challenging the legal sufficiency of a petition.[1] Because the trial court treated the demurrer as a motion for summary judgment and disposed of the case in that fashion (Pet. App. 5a), no answer to the petition was required or filed.

Although petitioners incessantly claim "delay" by respondent Commission in the processing of petitioner's subdivision plan, that tiresome allegation was *never* supported by the record. The record did establish that petitioners *never* sought, through respondent or by petitioning in court for a writ of mandamus, to get its *preliminary* subdivision plan before the Planning Board for a decision *on its merits* because petitioners had been informed by respondent's planning staff that the preliminary plan was defective on several counts.

Under the County Subdivision Ordinance, a *final* record plat cannot be approved (by the Planning Board or by default) unless it complies with a preliminary subdivision plan previously *approved by* the Board (section 50-37(b); Pet. 5). Instead of curing the preliminary plan's defects and submitting the plan to the Planning Board for action, petitioners simply waited several months and then submitted a final record plat, claiming the preliminary plan had been approved by default, as a way of trying to circumvent the effective date of the County Council's comprehensive downzoning of upper Montgomery County, which included petitioners' property.

The following chronology of critical events, based on the record, should make clear what really happened and why the petition should be denied:

---

[1]Maryland Rule of Procedure 345(d) then provides that "If a demurrer is overruled, the party demurring shall have the right to plead to the merits without withdrawing such demurrer, and upon an appeal he shall be entitled to have the questions of law arising thereunder decided as fully as if he had not pleaded to the merits."

October 2, 1973 — Montgomery County Council, sitting as District Council, enacted rural zone,[2] with grandfather clause for preliminary subdivision plans submitted to Planning Board in accordance with section 50-34 by June 4, 1974 and recorded by July 1, 1975;

May 31, 1974 — petitioners (as applicant) submitted to respondent's planning staff a preliminary subdivision plan for 968 acres, proposing 1,200 residential lots in R-200 zone in upper County;

June 17, 1974 — informal Subdivision Review Committee (members from various County agencies, chaired by John Broda, chief of Planning Board's subdivision office) discussed plan with applicant's submitting engineer and understood at that time that applicant would not pursue processing of the plan to the Planning Board until numerous problems and deficiencies with the plan were resolved by applicant;

August 20, 1974 — District Council comprehensively rezoned 119,000 acres of the upper County, including petitioners' property, to the rural zone;

December 2, 1974 — 5 and 1/2 months after the June meeting and *after* the rezoning, petitioners' engineer sent letter to Broda both requesting Planning Board approval of the preliminary plan and then stating alternatively that petitioners deemed the plan automatically approved "under the rule enunciated in *Silkor*" (Pl. Ex. B);

---

[2]The zone was held constitutional under the Fourteenth Amendment on September 23, 1977, by the Circuit Court for Montgomery County in *W.C. and A.N. Miller Development Co., et al. v. Montgomery County, et al.*, Law Nos. 40854, 40855, 40866, 40868, 40869, citing, *inter alia*, *Montgomery County, et al. v. Woodward & Lothrop, Inc., et al.*, 376 A.2d 483 (1977). Two of the five plaintiffs in *Miller* have appealed to the Maryland Court of Special Appeals.

December 12, 1974 — Broda wrote back, stating that since the June 17 meeting, he understood the applicant did not wish to pursue processing until it resolved the problems raised in June, but that if this were not the case now, to "please *let me know* and I will be more than happy to make the necessary arrangements to present the plan as submitted to the Planning Board at the *next* meeting." (emphasis added) (Pl. Ex. A);

February 10, 1975 — 2 months later, petitioners *instead* submitted a final plat covering a 40 acre portion of the 968 acres proposed to be subdivided (Pl. Ex. C);

February 11, 1975 — Broda wrote applicant that the submitted plat had been rejected by staff pursuant to County Code section 50-37(a)(2) (Pet. 5), for the reason that it did not conform to a preliminary plan that had been approved by the Planning Board, as required by section 50-37(b) (Pet. 5) (Pl. Ex. D);

April 11, 1975 — 2 months later, the final plat was resubmitted for Board action pursuant to section 50-37(a)(3) (Pet. 5) (Pl. Ex. G);

May 1, 1975 — the Planning Board, with a record plat submitted, thereupon disapproved the preliminary subdivision plan submitted on May 31, 1974, and hence, the record plat;

May 6 and 7, 1975 — John Broda notified applicant of the Board's actions on the preliminary plan and final plat and the reasons therefor (Pl. Ex. H, I).

ARGUMENT

As the Maryland courts so clearly found, this case posed simply a statutory construction question regarding the Montgomery County subdivision ordinance, namely, can a preliminary subdivision plan be approved by default if respondent's Montgomery County Planning Board does not act on the pre-

liminary plan within sixty days of submission. The language and rationale of sections 7-116(b) and 7-117 of respondent's enabling act (Article 66D of the Annotated Code of Maryland), of sections 50-2, 50-34, 50-35, 50-37(b) and (c) of the local subdivision ordinance, and of the definitive and controlling *Silkor* case, *supra,* all required a negative answer. Petitioners' persistent allegation of "administrative delay," never supported by the factual record (because it never occurred), has been used consistently to try to obfuscate the statutory construction issue that petitioners sought to avoid and could not circumvent.

This was not nor ever has been a zoning case. Nor was the issue of "denial of due process of law," raised by petitioners before this Court with a vague reference to the Fourteenth Amendment, an issue addressed to the Court of Special Appeals of Maryland. In its brief submitted to that court, petitioners presented four questions for decision:

> "I. Did the lower court misconstrue Section 50-35 of the Montgomery County subdivision regulations by failing to recognize the implications of its language and the import of its underlying policies, which dictate that the provision is to be read as being mandatory?
>
> II. Did the lower court err in granting a summary declaratory judgment in favor of the defendant-appellee, the Maryland-National Capital Park and Planning Commission, by failing to consider a material factual dispute between the parties?
>
> III. Does the doctrine of equitable estoppel operate so as to bar the defendant-appellee, MNCPPC, from disapproving the petitioner-appellants' preliminary subdivision plan and final record plat?
>
> IV. Did the petitioner-appellants fully comply with the letter and spirit of the Montgomery County subdivision regulations, thereby giving them the right to relief adequate to ensure the approval of their final record plat and realization of their Savage Tract development plan?" (Brief of Appellant at 2).

Where a question is not raised in state court, that question is not open for review on a petition for certiorari. *Ellis v. Dixon,* 349 U.S. 458, rehearing den., 350 U.S. 855.

Indeed, no state court in this non-federal statutory construction case "has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." Rule 19, Supreme Court Rules. Nor does this case involve any question likely to recur in other cases. Thus under Rule 19, there is no "special and important reason" for granting review of this case. Even if there were, there would be no denial of due process.

The only delays evidenced by the record were those quietly induced by petitioners in their tortuous attempt, given a defective preliminary plan, to avoid the unmistakable requirements of the subdivision ordinance that the Planning Board review preliminary subdivision plans, receiving technical recommendations from other government agencies and its professional staff. Petitioners carried on this charade in order to thereby possibly "beat out" the comprehensive rezoning which included their property. If there was "purposeful delay" running as a thread throughout this whole affair, it lay not with respondent Commission. This was an open-and-shut case of local statutory construction that has no federal or national import whatsoever.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent

January 1978

Certificate of Service

I hereby certify on this twenty-fifth day of January, 1978, that three copies of this brief in opposition were mailed first class postage prepaid to counsel for petitioners, James vanR. Springer, Dickstein, Shapiro & Morin, 2101 L Street, N.W., Washington, D.C. 20037.

Durvasula S. Sastri (GB)

DURVASULA S. SASTRI
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-828

FRANK A. GUNTHER, HERMAN EIG AND SIDNEY J. BROWN (Successors to Sheldon E. Bernstein, Leonard S. Melrod and Herman Eig), Partners d/b/a Savage Joint Venture, *Petitioners*

v.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

On Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland

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REPLY BRIEF FOR PETITIONERS

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IN THE

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MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

On Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland

---

REPLY BRIEF FOR PETITIONERS

The brief in opposition studiously ignores the fact that this case comes to this Court on a record consisting only of petitioners' complaint, as well as the fact that the decisions below were premised on the proposition that absent a statutory default by respondent "plaintiffs have no case, whatever the reasons for [respondent's] inordinate delay" (Pet. App. 6a). Thus, respondent's argument that the allegation of purposeful administrative delay "was *never* supported by the record" and its self-serving portrayal of "what

really happened" (Opp. p. 3) are irrelevant. The issue here is whether the allegations of the complaint state a claim of denial of due process, not whether petitioners would prevail if those allegations were put in issue, as they would be only upon a remand for further proceedings.[1]

As the petition points out, the due process issue was squarely raised in the trial court (Pet. p. 10; Pet. App. 16a ¶ 22). Petitioners' brief in the Special Court of Appeals argued that they "have been effectively denied due process by the defendant-appellee, MNCPCC * * *" (Brief of Appellants p. 21), and more particularly that

> "[T]he summary disposition of the case without ever according the parties an opportunity to a trial on the merits, especially when viewed in light of the loss of vested property rights by the petitioners (given them under the savings provisions of the Rural Zone) through the Board's prolonged inaction and the lower court's decision, amounts to a denial of due process guarantees as provided by Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment of the United States Constitution." *Id.* p. 13.

[1] Respondents directly contradict the allegations upon which the present issue was decided when they contend that "petitioners *never* sought * * * to get its *preliminary* subdivision plan before the Planning Board for a decision *on its merits* * * *" (Opp. p. 3) and that administrative delay "never occurred" (Opp. p. 6). The petition for a writ of mandamus and other relief filed in the trial court (Pet. App. 11a-17a) explicitly alleged, *inter alia*, that petitioners made a further submission in support of their preliminary plan in July 1974 (¶ 4), that prior to December 1974 there were "efforts on the part of Petitioners through their engineer to have their preliminary plan processed" (¶ 8) and that thereafter there were "several unsuccessful requests by the Plaintiffs to have the Defendant's staff proceed with review procedures * * *" (¶ 10). Indeed, respondent's version of "what really happened" (Opp. pp. 4-5) is internally inconsistent. If it is acknowledged that petitioners wrote a letter on December 2 "requesting Planning Board approval of the preliminary plan," how could respendent's staff "understand" on December 12 that "the applicant did not wish to pursue processing"? And if that was respondent's understanding, why did respondent ultimately take action on the preliminary plan on May 1, 1975? Petitioners seek only an opportunity to prove their allegation of purposeful administrative frustration of their applications —an allegation which must be assumed true for present purposes.

Petitioners' Petition for a Writ of Certiorari to the Maryland Court of Appeals explicitly referred to the Fourteenth Amendment (at p. 2) and raised the following question (at p. 3):

> "IV. Does the prolonged inaction of Respondent, resulting in abridgment of significant vested property rights, amount to a denial of due process?"

Under these circumstances, respondents cannot properly argue that this is merely a "case of local statutory construction" (Opp. p. 7) and cannot avoid the serious due process question raised by the petition.

For the foregoing reasons and those stated in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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2101 L Street, N.W.
Washington, D.C. 20037
Attorney for Petitioners

February 1978